# Supreme Court of the United States

OCTOBER TERM, 1962

No. ~~1508~~ 166

FAR EAST CONFERENCE, AMERICAN PRESIDENT LINES, LTD., ISTHMIAN LINES, INC., et al.,

*Petitioners,*

—against—

UNITED STATES OF AMERICA, FEDERAL MARITIME COMMISSION, H. KEMPNER, GALVESTON COTTON COMPANY and TEXAS COTTON INDUSTRIES, INC.,

*Respondents.*

***ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT***

## REPLY BRIEF FOR PETITIONERS


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The petitioners, all of whose names appear in the first paragraph of the petition, are reluctant to submit a Reply Brief but feel compelled so to do because the briefs in opposition have, on two points, dealt with matters of substantial importance in a manner which petitioners were unable to foresee and hence to treat adequately in the petition.

## I

### The Extension of the Far East Conference Contract System to Cotton Was Not a New Agreement Requiring Separate Approval

The petition for certiorari enumerated 22 separate and formal actions taken by the regulatory agency over the years between 1929 and 1952 which constituted indubitable evidence of approval. The briefs of the Department of Justice and of the Kempner interests have not challenged our contention that these successive agency actions evidenced approval of the Far East Conference contract system. Instead, they have resorted to the ingenious device of designating the extension to baled cotton of the existing approved system as the establishment of a *new system* which, they argue, required an approval separate from that given to the system itself.

It is clear from the record that the act of the Far East Conference in acceding to the request of the cotton shippers for dual rates and an exclusive patronage contract constituted a mere extension of the long existing contract system to baled cotton and not the initiation of a new contract system. The Far East Conference insisted that the same conditions and the same spread which were characteristic of its twenty year old contract system should merely be extended so as to include baled cotton (J.A. 162-163, 187).

*Isbrandtsen Co. v. United States*, 93 App.D.C. 293, 211 F.2d 51 (1954), established the necessity for approval of contract systems. It did not establish

the proposition that a new approval would be required each time that the system was extended to an additional commodity. The rationale of the Court of Appeals appears in 211 F.2d at 56:

> "* * * Clearly, a scheme of dual rates like that involved here is an agreement in this sense. It can hardly be classified as an interstitial sort of adjustment since it introduces an *entirely new scheme of rate combination and discrimination* not embodied in the basic agreement." (Emphasis supplied)

The approval of the Far East Conference's introduction of "an entirely new scheme of rate combination and discrimination" had, as we have shown, been manifested many times before the system was extended to cotton. There is nothing in *Isbrandtsen Co.* or any of the cases which follow it which suggests that new approval is required whenever a new commodity comes within the scope of the system or when the rates are changed. After the contract system had, in February, 1950, been extended to cotton, the Commission decided *American Hawaiian Steamship Co. et al. v. Intercontinental Marine Lines, Inc.*, 4 F.M.B. 160 (1953), which is briefly referred to at page 7 of our petition. What is not there said, however, is that it appears from the report that Intercontinental was organized by three contract shippers who proposed to operate only *from the Gulf to Japan.* The respondents have adequately advised this Court that the "life blood" of the trade from the Gulf to Japan is cotton, and it is clearly inferable that it was the Far East Conference contract system as applied to cotton among other commodities, which was referred to re-

peatedly in the Board's report, and in the portion of that report which was quoted in our petition, page 7.

What we have said above is merely intended to demonstrate that the final decision by this Court of what agency action constitutes approval of all types of 15 agreements is definitely involved in, and decisive of, one of the facets of this case on the merits.

## II

## Section 3 of Public Law 87-346

At pp. 14-16 of the petition, we stressed that the *interim* legislation was retroactive in its effects to the extent of substituting the concept of the legality of contract rate systems which were in use on May 19, 1958 until disapproval by the Commission for the concept of illegality prior to approval, announced in *Isbrandtsen Co. v. United States*, 211 F.2d 51, certiorari denied, 347 U.S. 990. At pp. 14-15 of our petition, we pointed out that §3 of the *permanent* legislation (Pub. L. 87-346) (printed at p. 13-15 of our petition) perpetuated this concept as to legality of contract systems in use on May 19, 1958.

We little foresaw that the respondents in their briefs in opposition here would ignore the effect of §3. Although both briefs in opposition print in their appendices considerable legislation, and the Department of Justice in its appendix does print §14b of the Shipping Act, as added by Pub. L. 87-346, which does not bear on the subject of retroactivity in the case of

any of the numerous May 19, 1958 contract systems, the brief of neither of the respondents discusses, or even prints in its appendix the text of, §3 which we urge is decisive on this important aspect of this case and the proper interpretation of this new and far-reaching legislation.

The silence of the respondents on this subject seems evidence of their inability to answer this argument.

## CONCLUSION

**For these additional reasons, the petition should be granted.**

Respectfully submitted,

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June 14, 1963